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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

Appellee,

versus

NEW ORLEANS PUBLIC SERVICE, INC.,

Appellant.

On Appeal from the Supreme Court of the State of Louisiana.

Statement Against the Jurisdiction Asserted by the New Orleans Public Service, Inc., Appellant.

BERTRAND I. CAHN,
City Attorney;

WM. F. CONKERTON,
Asst. City Attorney.

For City of New Orleans, Appellee.

BOOKBINDERS-ARMBEE PRINTING CO. INC., 419-421 CHARTRES, N. O.

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The appellee, against the Court's jurisdiction asserted by the appellant of the right of this Honorable Court to review the above entitled cause on appeal respectfully shows:

(I)

NATURE OF THE CASE.

In the year 1910, the Council of the City of New Orleans passed Ordinance No. 6445 New Council Series,

permitting the New Orleans Railway & Light Co., the predecessor of the N. O. Public Service, Inc., appellant, to construct a viaduct **"approximately on the center line of Franklin Avenue,** at, and in the vicinity of the Florida Walk intersection," the said viaduct by the terms of said ordinance **"to embrace earthen embankment approaches of such height and width as"** would **"NOT EXCEED THE NEUTRAL GROUND SPACE ON FRANKLIN AVENUE, NOR OBSTRUCT THE ROADWAYS OF SAID AVENUE."**

At the time of the passage of this ordinance, Franklin Avenue was not open, the streets were not paved and that section of the City of New Orleans served by the street car line traversing the said viaduct was very sparsely inhabitated. Since that time (practically 19 years ago) that particular area or portion of the City of New Orleans has rapidly developed and has now become one of the thickly populated sections of the City. **Franklin Avenue has been opened and paved** and now carries a very heavy part of the travel and traffic of that section of the city, particularly, the automobile traffic.

The New Orleans Public Service, Inc., by Special Master's Deed, dated September 27th, 1922, in the matter *New York Trust Company v. New Orleans Railway & Light Co.*, No. 16,953, in Equity (Consolidated Cause) in the United States District Court for the Eastern District of Louisiana, acquired the franchise granted to the New Orleans Railway & Light Co., under Ordinance No. 6032 New Council Series, which was an ordinance permitting

the extension of the line which traverses and uses the viaduct hereinafter referred to.

The Commission Council of the City of New Orleans on November 17th, 1926, passed Ordinance No. 9375 Commission Council Series (R. pp. 8-a and 8-b) which required the New Orleans Public Service, Inc., to remove the said viaduct and to complete the removal within one year from the date of the passage of the Ordinance.

The New Orleans Public Service, Inc., having failed to comply with the terms and provisions of said ordinance, the Commission Council of the City of New Orleans adopted a motion authorizing and directing the Mayor of the City of New Orleans to institute and prosecute a suit requiring the removal of the said viaduct in compliance with the provisions of Ordinance No. 9375 Commission Council Series.

The appellant resisted the action and among other things alleged in its answer (R. p. 9): That its predecessor was required by the City Council in 1910, to construct said viaduct; that same was constructed at an approximate cost of $58,000.00; that it has been operated with due regard to safety; that it is adequate and sufficient for the transportation of the users of said line; that there is no need to require the destruction of the viaduct; that there was no justification for the passage of Ordinance No. 9375 Commission Council Series; that it was not a legitimate exercise of the police power of the City; that it deprives defendant of its property without due process of law.

There was judgment in the District Court, in favor of the City of New Orleans, (appellee), as prayed for (R. p. 15) and on appeal to the Supreme Court of the State of Louisiana, this judgment was affirmed. (See Appendix for copy of that decision).

(II)

The questions presented by the pleadings in the case are as follows:

The grounds relied upon by the City of New Orleans for the demolition of the viaduct are:

1st: That it was not constructed in accordance with the ordinance authorizing its construction.

2nd: That as constructed it permits of the laying of but one railroad track, which is insufficient for the present needs of the people of that part of the City, served by the railway line, crossing the said viaduct.

3rd: That by reason of decay and the failure to keep it in proper repair, the viaduct has become dangerous and unsafe.

The defense of the New Orleans Public Service, Inc., in effect, is a general denial, and a plea that to require the demolition of the viaduct would be to deprive it of its property without due process of law, in violation of the Federal and State Constitutions; and, further, that such action would be an impairment of its contract rights; and finally, that there is a denial to it of the equal protection of the

laws, in contravention to the 14th Amendment to the Constitution of the United States.

From the foregoing it will be observed that other questions were presented for decision aside from the Federal question raised by the appellant in its answer.

(III)

The Supreme Court of the State of Louisiana, as will appear from the opinion and decree of that Court (see appendix) based its decision upon the following questions, which are non-federal:

> 1st: The right of the City under its charter Sub. Sec. 3 of Sec. 4 of Act 159 of 1912; Sub. Sec. 12 of Sec. 1 of Act 93 of 1912) to open and keep open and free from obstruction its streets, and to authorize the use of them for railroads operated by horse, electricty, steam or other motive power, and to regulate the same.
>
> 2nd: That it was a valid exercise of the police power vested in the City of New Orleans.
>
> 3rd: That the Commission Council of the City of New Orleans, had power under the facts of the case, to cause the demolition of the viaduct; and that same was not an unreasonable exercise of the police power vested in it.

(IV)

It is well settled that this Court will not entertain jurisdiction in review of State judgments where, beside the

Federal question decided by the state court, there is another and distinct ground on which the judgment can be sustained.

CASES DENYING JURISDICTION: The following decisions of this Honorable Court deny the jurisdiction of the appeal:

Blount v. Walker, 134 U. S. 607, 33 L. Ed. 1036.

Johnson v. Risk, 137 U. S. 300, 34 L. Ed. 683.

Cook County v. Calumet & C. Canal Dock Co., 138 U. S. 635, 34 L. Ed. 1110.

Wood Mowing Mach. Co. v. Skinner, 139 U. S. 293, 35 L. Ed. 193.

California Powder Wks. v. Davis, 151 U. S. 389, 38 L. Ed. 206.

Eustis v. Bolles, 150 U. S. 361, 37 L. Ed. 1111.

Wills v. Crane, 150 U. S. 84, 37 L. Ed. 1007.

Browne v. Union P. R. Co., 266 U. S. 255, 69 L. Ed. 601.

White v. Leovy, 174 U. S. 91, 43 L. Ed. 907.

Rutland R. Co. v. Central Vermont R. Co., 159 U. S. 630, 40 L. Ed. 284.

(V)

It has also been decided by this Court, that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property, without compensation, or without due pro-

cess of law, in the sense of the 14th Amendment. The following cases support this view:

Chicago & A. R. v. Tranbarger, 238 U. S. 67, 59 L. Ed. 1204.

Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979.

New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. Ed. 831.

Chicago B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. Ed. 596.

(VI)

We are taking the liberty of quoting below decisions which we believe hold that the exercise of the Police Power, in the interest of public health, morals and safety, are questions which are purely local and should be decided by the lawmaking body and the Courts of each State.

"The protection of the health and morals, as well as lives, of citizens, is within the police power of the state legislature."

Holden v. Hardin, 169 U. S. 366, 42 L. Ed. 780.

"The decision of the highest court of a state that a municipal ordinance which is asserted violates the Federal Constitution, is within the city's charter powers, and is not forbidden, is conclusive on writ of error to the state court."

Hadacheck v. Sebastian, 239 U. S. 394, 60 L. Ed. 348.

"Whether certain municipal ordinances challenged as violating the Federal Constitution are within the power conferred by the legislature upon

the municipal corporation is a question of state law, the decision of which by the highest court is conclusive upon the Federal Supreme Court on writ of error to the state court."

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. Ed. 721.

CONCLUSION.

We, therefore, submit that this Court is without jurisdiction and that the appeal should be dismissed.

Respectfully submitted,

BERTRAND I. CAHN,
City Attorney;

WM. F. CONKERTON,
Asst. City Attorney,

For City of New Orleans, Appellee.

APPENDIX.

CITY OF NEW ORLEANS vs. NEW ORLEANS PUBLIC SERVICE INC.	No. 29,873 SUPREME COURT OF THE STATE OF LOUISIANA.

Appeal from the Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

OVERTON, J. This is a suit to force the defendant to demolish a viaduct, owned and used by it for the passage of its street cars at the intersection of Franklin Avenue and Florida Walk, over the tracks of the Southern Railway Company, and to require it to construct at that point, along Franklin Avenue, at grade, a double line of tracks, to take the place of the single track, built on the viaduct.

The viaduct was built for the purpose of avoiding crossing at grade, the tracks, now used by the Southern Railway Company. The grounds chiefly relied on for the demolition of the viaduct are, first, that it was not constructed in accordance with the ordinance authorizing or directing its construction, secondly, that as constructed it permits of the laying of but one railroad track on it, which is insufficient for the present needs of the people in the part of the city, served by the railway line, crossing it; and, thirdly, that by reason of decay and the failure to

keep it in proper repair, the viaduct has become dangerous and unsafe.

The defense is a denial that the viaduct was not constructed as directed; a denial that one railway track, at that point, is insufficient for the needs of that section of the city; a denial that the viaduct is unsafe; a plea that, to require defendant to cross the Southern Railway tracks at grade would introduce a grave hazard, which the viaduct, since its construction, has eliminated; and that to require the demolition of the viaduct would be to deprive defendant of its property without due process of law, in violation of the federal and state constitutions, and to impair defendant's contract rights with the city, in violation of Section 10 of Article 1 of the Constitution of the United States, and Section 15 of Article 4 of the Constitution of this state, and a denial to defendant of the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

The viaduct, with the exception of the approaches, was constructed in 1910, under the authority of Ordinance No. 6445, New Council Series, adopted in that year, which directed that the viaduct be so constructed as to embrace earthen embankment approaches of such height and width as not to exceed the neutral ground space on Franklin Avenue, nor obstruct the roadways thereon. The embankments for the approaches, leading up to the viaduct, were constructed in 1914. In 1926, petitions were addressed to the Commission Council of the City of New Orleans, asking, for various reasons, that the viaduct be demolished. The council caused an investigation to be made to ascertain

the condition of the structure. Two examinations were made to determine its condition. The report made to the council indicated that the viaduct was becoming unsafe, though not so much so as to require the immediate cessation of traffic over it. As a result of the report, the council passed Ordinance No. 9375 Commission Council Series, on November 17, 1926, ordering defendant to remove the viaduct, and ordering it to construct, operate and maintain a double line of tracks for the operation of its cars, at street level, along Franklin Avenue and across Florida Walk, the tracks to be constructed in accordance with plans and specifications to be prepared by defendant, and approved by the Commissioner of Public Utilities and the City Engineer of New Orleans, the removal of the viaduct to be completed within one year after the passage of the ordinance. The year elapsed with no effort on the part of defendant to comply with the council's order. This suit is virtually an effort to enforce compliance with the ordinance.

The viaduct is of trestle construction, or in other words, the track structure is built on piles. The first inspection made at the instance of the council, showed that the viaduct was in an unsafe condition, primarily on account of the condition of the bents, that is, the supporting structure, which support the stringers and the track structure itself. At this inspection it appeared that the condition of the bents varied considerably. Some were in a satisfactory condition, while others, which supported the spans, were considerably rotted, and in others, the piling that supported the caps, and in turn the track structure, had become rotten to such an extent as to leave nothing but a shell

of the former piling. As to the foundation on the river side the earth had subsided from the base of the pier to such a degree as to expose at least two or three rows of the piling that supported it. The front row of the piling had twelve piles, and of these, five had so rotted as to make them dangerous. As to the second and third rows, the engineer making the inspection, was unable, due to conditions, to inspect them, but felt that, as the piles there were exposed to the puddling action of rain water, which might seep under and not drain away, as was the case with the piling in the first row, that the same condition existed there as in the first.

Not many days later, though after the ordinance condemning the viaduct had been passed, a second inspection was made. It was then found that the conditions existing at the first inspection had been somewhat improved by defendant, by reason of the removal, at its instance, of certain of the bents considered dangerous at the first inspection, but it was found that other bents were still in a dangerous condition. The work of replacement was found to be satisfactorily done, save in two instances, where the replaced piling failed to make proper contact, but in those instances, the defective work had but little effect on the strength of the bridge. At this inspection ten bents on the riverside of the structure were found to be unsafe, and six on the Gentilly side, making a total of sixteen.

While the evidence offered by the defense shows that some of the piling was decayed, yet the tendency of the evidence offered by it is to the effect that the structure

at no time was in a dangerous condition, notwithstanding it had been weakened by decay.

Our conclusion is that the evidence does not justify us in holding that the structure may be properly regarded as safe, but, to the contrary, it should be regarded as unsafe, notwithstanding the repairs that have been made, although it is unlikely that there is immediate danger of a collapse.

The contention that the viaduct was not constructed according to the ordinance, authorizing or directing its construction, is based upon the contention that it is so built as to narrow the roadway by encroaching upon it, whereas the ordinance provides that the structure must be built approximately on the center line of Franklin Avenue, and so as not to exceed the neutral ground, nor obstruct the roadways on that avenue. The evidence shows that on the river side of the structure the construction is such as to maintain the correct width between curves, that is to say, a width of twenty-eight feet, but that at one point at the terminus of one of the embankments, the roadway has been narrowed from twenty-eight to eighteen feet. It is not unlikely, however, that this condition is due, not to improper construction by defendant, but to a taking by plaintiff of twelve feet of the roadway for a side walk, about the time that the roadway was paved. Granting this to be the case, it does not follow, however, that plaintiff is not entitled to regulate the right granted to cross Florida Walk, so as to obtain, if necessary, the required width for the roadway.

The contention that the viaduct should be removed, because it is so constructed as to admit of but one railway track on it, when there should be two over it, to serve properly that section of the city, served by the railway, crossing the viaduct, is scarcely sufficiently supported by the evidence to justify, of itself, the removal of the viaduct. The population of that section of the city, served by the railway line, has unquestionably considerably increased since the construction of the viaduct in 1910, and probably will continue to increase, but it does not appear to us that it has yet so increased as to call for the removal of the structure in order to provide for double tracks, though this may become necessary at some time in the future.

Plaintiff has power under its charter to open and keep open and free from obstruction its streets, and to authorize the use of them for railroads operated by horse, electricity, steam or other motive power, and to regulate the same. Sub Sec. 3 of Sec. 4 of Act 159 of 1912; Sub Sec. 12 of Sec. 1 of Act 93 of 1921. Plaintiff unquestionably has ample police power for the discharge of its functions, "including the power to enact and enforce all ordinances necessary for the protection of the lives and property, for the preservation of the health, and for the promotion of the comfort, convenience, and general welfare of its inhabitants, and including, specifically, the power to regulate the use of the streets and to maintain them in a safe condition." City of New Orleans v. LeBlanc, 139 La. 113, *119*, 71 So. 248.

We feel from the evidence before us that the viaduct, due to decay, is not in a condition, notwithstanding the re-

pairs made, that should be regarded as safe. Such being the case it is obvious that something should be done to correct the situation. The Commission Council reached the conclusion that the viaduct should be removed and grade crossings constructed in its place, consisting of double tracks. The council evidently did not consider that repairs would solve the problem. We are not prepared to say that the council, which is intrusted, within reasonable limits, with power to determine what should be done, has erred in ordering the removal of the structure, but think that the evidence justifies the action of that body. The viaduct has been there a number of years. The evidence of the City Engineer leads to the conclusion that, if repairs were undertaken, they would have to be substantial repairs, and rather extensive. If repairs were undertaken and proved to be adequate, they would doubtless result in leaving the roadway narrowed at the point indicated above, when the city should be in position to increase the roadway there to its proper width. Moreover, if the repairs proved to be adequate, they would perpetuate a viaduct, which is admittedly capable, due to its width, of accommodating only one railway track, when sooner or later, in all likelihood, another will be required. The city has power, under the facts of the case, to cause the demolition of the viaduct. Its action, in so directing, is not an unreasonable exercise of the police power. In changing the crossing from an overhead to a grade crossing it is fair to assume that the city will see that proper precautions will be taken to avoid accidents. By ordering the change made the city is not depriving defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, nor of Section 2 of Article 1 of the Constitution of

this state, nor is the city impairing the obligation of defendant's contract with it, in violation of the Constitution of this state and of the United States, for by ordering the removal defendant is legitimately exercising its police power, subject to which defendant holds its franchise. Chicago & Alton Railway Company v. Tranbarger, 238 U. S. 67, 59 L. Ed. 1204; City of Shreveport v. Kansas City, S. & G. Ry. Co. 167 La. —, 120 So. 290.

For these reasons, the judgment appealed from is affirmed.